DISTRICT COURT, DENVER COUNTY, COLORADO 1437 BANNOCK STREET DENVER, COLORADO 80202	DATE FILED: May 17, 2019 2:55 PM FILING ID: E45C3DCA5EF26 CASE NUMBER: 2019CV31577
Plaintiff: DEFEND COLORADO, a Colorado nonprofit association v. **Defendants:** GOVERNOR JARED POLIS and THE COLORADO AIR QUALITY CONTROL COMMISSION	**▲ COURT USE ONLY ▲**
Attorneys for Defendant ***COLORADO AIR QUALITY CONTROL COMMISSION:*** **PHILIP J. WEISER, Attorney General** THOMAS A. ROAN, #30867* First Assistant Attorney General ROBYN L. WILLE, #40915* Senior Assistant Attorney General Air Quality Unit Natural Resources and Environment Section 1300 Broadway, 7th Floor Denver, CO 80203 Phone: 720-508-6268 (Roan) 720-508-6261 (Wille) E-mail: tom.roan@coag.gov robyn.wille@coag.gov **Counsel of Record*	Case Number: 2019CV031577 Division: 203

DEFENDANT AIR QUALITY CONTROL COMMISSION'S MOTION TO DISMISS THE FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF

Defendant, the Colorado Air Quality Control Commission ("Commission") by and through undersigned counsel of the Office of the Colorado Attorney General, moves to dismiss Plaintiff Defend Colorado's first, second, and third claims for relief pursuant to C.R.C.P. 12(b)(1) and (b)(5), with prejudice.

CERTIFICATE OF COMPLIANCE WITH C.R.C.P. 121 §1-15

Undersigned counsel for the Commission has attempted to confer with Defend Colorado's counsel about this Motion to Dismiss. Defend Colorado opposes this Motion.

I. INTRODUCTION

Defend Colorado challenges the Commission's March 21, 2019 order ("March 21 Order") declining to rule on Defend Colorado's petition for expedited public hearing and request for declaratory order (hereinafter "Petition"). On March 21, 2019, the Commission conducted a public hearing to debate whether to take up the Petition pursuant to §24-4-105(11), C.R.S. and the Commission's Procedural Rules, 5 Code Colo. Reg. §1001-1, §VI.H. Compl. ¶ 119. Following that hearing, the Commission declined, concluding Defend Colorado lacked standing to seek a declaratory order. *Id*; March 21 Order, ¶ 2, attached as **Exhibit 1**.[1] Defend Colorado moved to reconsider or clarify the March 21 Order. Compl. ¶ 15. The Commission denied that motion, confirming that Defend Colorado lacked standing to seek a declaratory order and was not entitled to a public hearing on the merits of its Petition. *Id.* ¶ 127; April 8 Order, ¶ 2, attached as **Exhibit 2.**[2]

In its Complaint, Defend Colorado does not directly challenge the Commission's decision that Defend Colorado had no standing to seek a declaratory order. Instead, in its first and second claims for relief, Defend Colorado challenges the Commission's decision to deny its (allegedly) separate request for a public hearing to consider the impacts of international emissions and exceptional events on the State's pending May 1, 2019 data certification to the United States

[1] The Commission's attachment of its March 21 Order does not convert this Motion to Dismiss into a motion for summary judgment under C.R.C.P. 56. *Yadon v. Lowry,* 126 P.3d 332 (Colo. App. 2005) (holding that documents referred to in the complaint – even though not attached thereto – may be considered by a court on a motion to dismiss without converting the motion into a motion for summary judgment, if they are central to a plaintiff's claim). Here, the March 21 Order is referenced in the Complaint and is the order for which Defend Colorado seeks review by this Court and is therefore central to its claims. *See inter alia* Compl. ¶¶ 1, 13-14, 17, 37.

[2] The attachment of the April 8 Order does not convert this Motion to Dismiss into a motion for summary judgment, for the same reasons set forth in footnote 1, *supra. See, inter alia,* Compl. ¶¶ 15-17, 124-27.

Environmental Protection Agency ("EPA"). Compl. ¶¶ 154, 167. In its third claim for relief, Defend Colorado challenges the Commission's alleged "acquiescence" into Governor Polis' allegedly improper influence over the Commission's decision to deny the Petition. *Id.* ¶ 176.

Defend Colorado's claims against the Commission are based on a fundamental misunderstanding of the federal Clean Air Act, 42 U.S.C. §7401 *et seq.*, its implementing regulations, and the Colorado Air Pollution Prevention and Control Act, §25-7-101 *et seq.* ("Colorado Air Act"), and multiple mischaracterizations thereof. As set forth in more detail herein, this Court does not have subject matter jurisdiction over Defend Colorado's first, second, and third claims for relief. Further, Defend Colorado fails to state a cause of action against the Commission. Therefore, this Complaint should be dismissed under C.R.C.P. 12(b)(1) and (b)(5).

II. BACKGROUND

In its Petition and in its Complaint, Defend Colorado claims the Commission must hold a public hearing to evaluate the effects on ozone concentrations in the State of air pollution emissions from foreign countries as well as from exceptional events. Compl. ¶ 114(a). Defend Colorado's purported purpose is to ensure that an annual data certification letter from the State to the EPA, due by May 1, 2019 (the "May Data Certification"), accurately reflects all sources of air pollution. *Id.* ¶ 114(b). Defend Colorado has alleged that the May Data Certification will have significant consequences for the State's compliance with the 2008 National Ambient Air Quality Standard for ground-level ozone ("2008 ozone NAAQS"). *Id.* ¶¶ 146-48.

A. Background on Ozone and the Denver Nonattainment Area

Ozone is a "criteria pollutant" for which the EPA must promulgate NAAQS, setting nation-wide levels of ozone that States must endeavor to stay below to protect public health and welfare. Compl. ¶ 79; *see also* 42 U.S.C. §§ 7408, 7409; 73 Fed. Reg. 16,436 at 16,437 (Mar. 27, 2008). In 2012, the Denver Metropolitan/North Front Range ozone nonattainment area ("Denver Nonattainment Area") was designated a "Marginal" nonattainment area under the 2008 ozone

NAAQS, meaning that the Denver Nonattainment Area had a "design value" (i.e. the annual fourth-highest daily maximum 8-hour concentration recorded across all monitors, averaged over the three preceding years) above the 2008 ozone NAAQS value. Compl. ¶ 81; 77 Fed. Reg. 30,088 (May 21, 2012). The Denver Nonattainment Area's design value as of its July 20, 2015 attainment date (averaging over 2012, 2013, and 2014) was above the 2008 ozone NAAQS, and therefore the Denver Nonattainment Area was reclassified as a "Moderate" nonattainment area. Compl. ¶ 82; 81 Fed. Reg. 26,697 at 26,699 (May 4, 2016). As a "Moderate" area, the deadline for attainment of the 2008 ozone NAAQS became July 20, 2018. Compl. ¶ 83; 81 Fed. Reg. at 26,699; 42 U.S.C. §7511(a)(1). Attainment would be evaluated looking at the design value over the three-year period of 2015 to 2017. 42 U.S.C. §7511(b)(2)(A); 40 C.F.R. §50.15.

On June 4, 2018, the Colorado Department of Public Health and Environment, Air Pollution Control Division ("CDPHE") submitted to the EPA a demonstration that no monitor in the Denver Nonattainment Area had recorded any values that exceeded the 2008 ozone NAAQS in 2017 (the "Colorado Extension Request"). Compl. ¶ 8.[3] The Colorado Extension Request sought for EPA to take action to extend the Denver Nonattainment Area's attainment date from July 20, 2018 to July 20, 2019. *Id.* ¶ 87; Ex.3. On November 14, 2018, the EPA proposed to approve the Colorado Extension Request. Compl. ¶ 10. However, as of the Commission's action under review in this case, the EPA had not taken final action on its proposal. *Id.* ¶ 90.[4] Therefore the Denver Nonattainment Area's effective attainment date remained July 20, 2018, and the years of data relevant to attainment remained 2015, 2016, and 2017.

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[3] In the Complaint, Defend Colorado alleges that it was the Commission that sent the Colorado Extension Request to the EPA. However, it was CDPHE, not the Commission. The Colorado Extension Request was attached to Defend Colorado's Petition as Exhibit 7A, and is attached hereto as **Exhibit 3**. The Commission requests that this Court take judicial notice pursuant to C.R.E. 201 that it was CDPHE, and not the Commission, that sent the Colorado Extension Request to the EPA. This fact is not subject to reasonable dispute, as it is evident on the face of this letter, whose accuracy cannot reasonably be questioned.

[4] Nor has it still, as of today's date, but the pertinent information for this Motion to Dismiss is the status and attainment date at the time of the Commission's action under review.

Defend Colorado hopes to freeze the Denver Nonattainment Area's classification at "Moderate" to avoid the requirements associated with a "Serious" classification. In pursuit of that goal, Defend Colorado filed its Petition to force the State into submitting, as part of the May Data Certification, a demonstration to the EPA that the State would comply with the 2008 ozone NAAQS but for exceptional events and air pollution from foreign countries. *Id.* ¶ 114(b). Defend Colorado mistakenly asserts the legal conclusions both that the May Data Certification is relevant to a reclassification and that it is the proper vehicle for the demonstration sought.

B. The May Data Certification: the Annual Air Monitoring Data Certification Letter

A central premise of the Complaint is that it is the May Data Certification that will determine whether the Denver Nonattainment Area is reclassified to Serious nonattainment. This premise is mistaken.[5] Every day, air quality monitors around Colorado measure and record the levels of ozone. These data are reported to the EPA on a quarterly basis via the EPA's Air Quality System, or "AQS."[6] 40 C.F.R. §58.16(b). These data must also be subject to quality assurance on an annual basis. 40 C.F.R. §58.15. Federal regulation requires that a state agency, through its head official or his/her designee, submit to the EPA "an annual air monitoring data certification letter" certifying that the previous calendar year's data have been submitted to AQS and that the ambient concentration data and quality assurance data are accurate to the best of his/her knowledge. *Id.*

Defend Colorado incorrectly alleges that the May Data Certification is "a certification of the accuracy of the Colorado's [sic] emission data and Colorado's legal position on whether it is in attainment or nonattainment for current NAAQS." Compl. ¶¶ 44, 46, 48. This legal conclusion is both inaccurate and misleading. The statutes and rules cited by Defend Colorado in support

[5] It is also a legal conclusion, not a statement of fact to which this Court need give any deference.
[6] AQS is the "the federal computerized system for storing and reporting of information relating to ambient air quality data." 40 C.F.R. §58.1.

contain no indication or direction that the May Data Certification is anything other than a certification that the State's monitoring data for the previous calendar year have been reported and have been subjected to quality assurance procedures. *Id.* ¶¶ 44-47.

Further, Defend Colorado insists it is the May Data Certification for calendar year 2018 that will determine whether the Denver Nonattainment Area is reclassified to Serious. *Id.* ¶ 92. This is untrue in three respects. First, attainment is evaluated based upon the design value over a three-year period, not based upon granular monitoring data for one calendar year. *Id.* ¶ 47 (citing 40 C.F.R. §50.15). Second, the May Data Certification for ozone data from calendar year 2018 is irrelevant to the reclassification. The information pertinent to reclassification is the highest design value across the Denver Nonattainment Area's monitors as of the attainment date, which, in this case, is July 20, 2018, and therefore only data from calendar years 2015, 2016, and 2017 are relevant.[7] 81 Fed. Reg. 26,697 at 26,698-9 (May 4, 2016); 42 U.S.C. §7511(a)(1) and (b)(2)(A); *see also* Petition at 12, attached hereto as **Exhibit 4**.[8] Defend Colorado appears to recognize this truth, *see* Compl. ¶¶ 85-86,[9] but nonetheless proceeds to assert multiple claims for relief against the Commission based upon a misconstruction of the May Data Certification.

Third, it is not actions of the State in sending the May Data Certification that result in the reclassification of the Denver Nonattainment Area to Serious – it is the final action of the EPA, done through notice and comment rulemaking in accordance with the Clean Air Act. *See* 42

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[7] Such has been the case since the reclassification to Moderate, including as of today's date and as of the date the Commission declined to take up Defend Colorado's Petition, which is the decision for which Defend Colorado seeks review by this Court.

[8] The Petition is not outside the four corners of the Complaint; it is referenced and cited in, and central to, the Complaint, as the Commission's refusal to take up the Petition is the action for which Defend Colorado seeks review in this Court. *See supra* fn.1. Even if it were outside the four corners of the Complaint, this Motion to Dismiss seeks dismissal under C.R.C.P. 12(b)(1), and therefore reference to the Petition may be had. *See Trinity Broad. of Denver, Inc. v. City of Westminster,* 848 P.2d 916 (Colo. 1993).

[9] In ¶ 86, Defend Colorado alleges that EPA was "bound" by the data certification letter sent last year to reclassify the Denver Nonattainment Area to Serious.

U.S.C. §7511(b)(2)(B). Defend Colorado will have the opportunity to challenge the EPA's rule reclassifying the Denver Nonattainment Area to Serious, if and when the EPA takes that action.

Defend Colorado also mischaracterizes the May Certification as an "agreement" under §24-4-124(3), C.R.S. that would require Commission approval. Compl. ¶¶ 143, 150. However, the May Data Certification cannot reasonably be characterized as an "agreement." Though not defined in the Clean Air Act or Colorado Air Act, an agreement is "[a] coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing." *Black's Law Dictionary,* (2nd Ed.).[10] The May Data Certification is simply a report submitted to the EPA, not an agreement with the EPA.

C. Exceptional Events and the May Data Certification

Defend Colorado alleges that the May Data Certification needs to include supporting documentation for the influence of "exceptional events" on ozone data. Compl. ¶¶ 6, 52-53, 152. Exceptional events are events, not reasonably controllable or preventable, such as forest fires, which cause air pollution of sufficient magnitude to trigger exceedances of the ozone NAAQS. *Id.* ¶ 51(c); 42 U.S.C. §7619(b)(1); 40 C.F.R. §50.1(j). The May Data Certification is not the means by which the State would request exclusion of ozone monitoring data influenced by exceptional events. *See* Compl. ¶¶ 84, 100, 109 (recognizing that one of the State's previous exceptional events submittals was made, just last year, by letter dated June 4, 2018, and not in conjunction with the annual data certification, which was sent separately to the EPA on April 28, 2018). That process is governed by a separate federal regulation and proceeds separately from the annual data certifications, like the May Data Certification. 40 C.F.R. §50.14(c) (providing for

[10] *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*, https://thelawdictionary.org/agreement/ (last visited May 6, 2019); *People v. Serra,* 361 P.3d 1122, 1133 (Colo. App. 2015) (noting that courts may refer to dictionary definitions to determine the plain and ordinary meaning of undefined terms); *see also* §24-71.3-102, C.R.S. (defining "agreement" in the Uniform Electronic Transactions Act as "the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction").

the procedures to make an exceptional events demonstration). Further, the Commission is not required to hold a public hearing before the State sends an exceptional event demonstration to the EPA; instead, only an opportunity for public comment is required. *Id.* at §50.14(c)(3).

D. International Emissions and the May Data Certification

Last, Defend Colorado alleges that the May Data Certification needs to account for the alleged contribution of international emissions on ozone concentrations in the Denver Nonattainment Area. Compl. ¶ 152. In support, Defend Colorado points to Clean Air Act §179B, 42 U.S.C. §7509a, which reflects Congress' understanding that there are situations where a state's ozone nonattainment problems may not be due to its failure to control sources within the state's boundaries. *Id.* ¶ 51(d).

Under §179B(b), if a state predicted attainment but did not actually attain the standard, that state may avoid the reclassification to a higher level of nonattainment if it can demonstrate that would have attained "but for" international emissions. *Id.* (citing 42 U.S.C. §7509a(b)). The §179B(b) technical demonstration is not required to be submitted to the EPA as a revision to a state implementation plan (SIP), following notice and comment rulemaking. 42 U.S.C. §7509a(b). Even if it were, the May Data Certification is not the mechanism by which a §179B(b) demonstration would be submitted to the EPA. *See* 40 C.F.R. §§58.15, 58.16.

III. DEFEND COLORADO HAS NO STANDING TO OBTAIN RELIEF REQUESTED IN THE COMPLAINT

The "injury" central to Defend Colorado's Complaint stems from a projected reclassification of the Denver Nonattainment Area to Serious nonattainment – not from the denial of the Petition, or from the sending of the May Data Certification. Compl. ¶¶ 22-29. Importantly, Defend Colorado does not assert any facts alleging that it – as opposed to its members – will suffer injury from the reclassification. *Id.* Thus its standing, to the extent it has any, is associational in nature. However, Defend Colorado, on its own behalf and on behalf of its

members, lacked standing to seek relief from the Commission, and also lacks the requisite standing now to bring its claims for relief against the Commission, so this matter must be dismissed. *Grossman v. Dean*, 80 P.3d 952, 958 (Colo. App. 2003).

A. Legal Standard for Standing

Defend Colorado has the burden to prove subject-matter jurisdiction and standing. §24-4-106(4), C.R.S.; *Trinity Broad. of Denver, Inc. v. City of Westminster,* 848 P.2d 916 (Colo. 1993). Defend Colorado's allegations of fact are not given a presumption of truthfulness in the consideration of a motion to dismiss under Rule 12(b)(1), and this Court need not accept as true Defend Colorado's conclusions of law. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

Defend Colorado asserts this Court has jurisdiction pursuant to §24-4-106(4), C.R.S., which affords adversely affected or aggrieved parties the right to challenge a final agency action. Compl. ¶¶ 22-23. To establish standing for judicial review of final agency action, Defend Colorado bears the burden of alleging facts in the Complaint establishing it has been adversely affected or aggrieved. §24-4-106(4), C.R.S. ("The complaint shall state the facts upon which the plaintiff bases the claim that he or she has been adversely affected or aggrieved…"). Defend Colorado must also establish that it has suffered an injury-in-fact to a legally protected interest. *Marks v. Gessler*, 350 P.3d 883, 899–900 (Colo. App. 2013) (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (1977)). Defend Colorado must demonstrate the Commission's action has either caused or threatens to cause an injury. *Marks*, 350 P.3d at 900.

B. Defend Colorado Was Not A Proper Petitioner Before the Commission and Has No Standing to Obtain the Relief Requested in the Complaint

Defend Colorado's Petition sought to compel the Commission to hold a public hearing to debate the influence of international emissions and exceptional events upon the Denver Nonattainment Area's ozone status, and its Complaint seeks the same relief. Compl. ¶¶ 114(a), 154, 167. In addition, Defend Colorado demanded that, at the conclusion of that hearing, the

Commission issue a declaratory order to require CDPHE to include in the May Data Certification a demonstration to excuse ozone violations based upon exceptional events and international emissions. *Id.* ¶ 114(b); *see also* Petition at 1-2. Thus, the ultimate relief sought in the Petition by Defend Colorado was the issuance of a declaratory order, from which its request for a public hearing is not severable.

In *Colo. Oil and Gas Conservation Com'n v. Grand Valley Citizens' Alliance*, 279 P.3d 646 (Colo. 2012), the Colorado Supreme Court ruled that the commission's decision not to grant the petitioners' request for a hearing on a permit application was proper, upholding the trial court's dismissal on the grounds that the petitioners lacked standing to request such a hearing. The same principle applies here. Under the Colorado Air Act and the Commission's Procedural Rules, a petition for declaratory order may be used to resolve a controversy or settle a question about how a statute, rule or order applies to the petitioning party. The Commission's Procedural Rules state, in relevant part:

> Pursuant to Section 24-4-105(11), C.R.S., the Commission, in its discretion, may review petitions for declaratory orders in order to terminate controversies or **to remove uncertainty in the application to a petitioner of provisions of the Act or of any relevant statute, rule, regulation, decision, permit, or order.**

5 Code Colo. Reg. §1001-1, §VI.H (emphasis added); *see* §24-4-105(11), C.R.S.

The Petition sought a hearing followed by issuance of a declaratory order directing CDPHE to pursue a perceived remedy under the Clean Air Act (to include an exceptional events and §179B(b) demonstration in the May Data Certification). Compl. ¶ 114; Ex.4 at 1-2, 22. The Commission rightly declined to take up the Petition in full because Defend Colorado had no standing to seek a declaratory order. Compl. ¶ 13; Ex.1 ¶¶ 5-6; *see also* Ex. 2 ¶ 2 (wherein the Commission held that "[b]ecause Defend Colorado does not have standing to request a declaratory order, holding a hearing to determine whether to issue such an order is illogical"). Defend Colorado identified no controversy or uncertainty in the interpretation as applied to it of a statute or rule to

resolve through a declaratory order. *See* Ex.1, Ex.2, Ex.4. The plain language of Defend Colorado's Petition, as set forth therein and as described in the Complaint, reveals that the public hearing request was not severable from the declaratory order – because ultimately the relief sought at the conclusion of the public hearing was the issuance of the declaratory order.

Defend Colorado has not challenged the Commission's decision not to take up the Petition on the grounds that Defend Colorado had no standing to obtain a declaratory order. Even a cursory review of the actual claims for relief in the Complaint reveals that Defend Colorado's claims against the Commission focus on the denial of its request for a public hearing, particularly in the first and second claims for relief. Because Defend Colorado's request for a public hearing was not severable from its request for a declaratory order, and because the Commission properly determined Defend Colorado had no standing to seek a declaratory order (a decision that was not timely challenged by Defend Colorado), this Complaint must be dismissed.

C. Defend Colorado and its Members Have Suffered No Injury-in-Fact

Defend Colorado claims its members will suffer injury in the form of "increased federal regulatory oversight and more stringent permitting and other compliance requirements" if the Denver Nonattainment Area is reclassified as Serious nonattainment. Compl. ¶ 24. This injury, even if true, is irrelevant because a reclassification to Serious nonattainment is unrelated to the relief sought by Defend Colorado in the Complaint – which is a public hearing on the May Data Certification. Defend Colorado cannot satisfy the injury-in-fact prong of the *Wimberly* standing test, because its claims rest on "the remote possibility of a future injury," that is "indirect and incidental to the defendant's action." *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1007 (Colo. 2014). Defend Colorado alleges the kind of harm that is a perfect example of the kind of indirect, possible future action that fails to meet the injury-in-fact test. *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890-91 (Colo. 2001). Defend Colorado's

claimed injury is nothing more than speculation which is insufficient to establish injury-in-fact. *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192, 208-209 (D.C. Cir. 2011).

Defend Colorado sought a hearing on whether the Denver Nonattainment Area would, but for exceptional events and international emissions, attain the 2008 ozone NAAQS and, if so, demanded the issuance of a declaratory order directing CDPHE to make that demonstration to EPA in the May Data Certification, with the hope that EPA would not reclassify the Denver Nonattainment Area as Serious nonattainment. Compl. ¶ 114; Ex. 4. The Commission could have granted the hearing[11] and yet still would have had to decline to issue the declaratory order for lack of standing. Even assuming the Commission improperly denied Defend Colorado a hearing, the organization cannot claim holding the hearing, by itself, would have avoided the injury alleged – i.e. more stringent regulations in the Denver Nonattainment Area. As discussed in *supra* Section II, the May Data Certification for calendar year 2018 data simply has no connection to a reclassification to Serious; the EPA's decision on that front must be based on the design value averaged over years 2015, 2016, and 2017. Thus, there is no injury, and this action is moot, because there is no "case or controversy" related to Defend Colorado's alleged injury that would be resolved by reversing the Commission's decision not to hold a public hearing. *See Developmental Pathways v. Ritter,* 178 P.3d 524, 530 (Colo. 2008) (holding that "[t]he mootness doctrine prevents a court from deciding a case when there is no "actual or existing controversy").

Defend Colorado's alleged harm must be "fairly traceable" to the Commission's decision under review. *See Colorado Press Ass'n v. Brohl,* 2015 WL 13612122 at *2 (D. Colo. Mar. 13, 2015). Even if the Commission had granted the Petition, held a public hearing, and directed the submittal of an exceptional events and §179B(b) demonstration in the May Data Certification, such action would not automatically avoid the Serious reclassification that Defend Colorado

[11] Assuming, *arguendo,* that it had the authority to do so, which is not a question germane to this Motion to Dismiss.

alleges would cause it injury. There are several intervening actions, some by third-parties, that preclude any reasonable argument that the Commission's actions here caused Defend Colorado's members any injury.

Defend Colorado's allegations assume that an exceptional events and/or §179B(b) demonstration could, in fact, be made, and that if made, would be approved by the EPA after notice and comment rulemaking. Then, Defend Colorado assumes that the rulemaking would not be challenged by interested parties, would not be stayed by the court pending this challenge, and would ultimately be upheld by a court. Defend Colorado also assumes that as a result, the EPA would decide not to reclassify the Denver Nonattainment Area as Serious, ultimately resulting in a temporary freeze of the Denver Nonattainment Area at a Moderate classification, as a result of which some of its members would presumably have more time before being subject to some uncertain future stringent regulation. The connection between the Commission action complained of and the alleged harm is therefore just too attenuated. Thus, again, there is no injury and this case is also therefore not "ripe," the doctrine of which prevents a court from considering "uncertain or contingent future matters because the injury is speculative and may never occur." *DiCocco v. National General Ins. Co.,* 140 P.3d 314, 316 (Colo. App. 2006).

D. Defend Colorado Has Not Established Injury to a Legally Protected Interest

Defend Colorado also cannot establish it has any interest that is legally protected, which is a question of whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation. *Wimberly*, 570 P.2d at 539; *Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo.1992). A legally protected interest may be tangible or economic such as "one of property, one arising out of contract, one protected against tortious invasions, or one founded on a statute which confers a privilege." *Wimberly*, 570 P.2d at 537 (*quoting Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 59 S. Ct. 366, 83 L.Ed. 543 (1939)). On the other hand, the right may protect something intangible such as an

interest in free speech or expression, or an interest in having a government that acts within the boundaries of our state constitution. *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 866 (Colo. 1995). Thus, legally protected rights encompass all rights arising from constitutions, statutes, and case law.

Defend Colorado argues the Colorado Air Act provides it with a legally protected right to a public hearing. Compl. ¶¶ 22(c), 152-3. In context, this argument must fail because the public hearing Defend Colorado seeks is unavailable as inseverable from its improper request for declaratory order, *supra* Section III.B, and because it was not separately required under the statutes upon which Defend Colorado relies. *See infra* Section IV.B.

E. Defend Colorado Has Also Failed to Establish Associational Standing

Defend Colorado must allege sufficient facts in the Complaint supporting the following requirements to establish associational standing: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to its purpose; and (3) neither the claim asserted, nor the relief requested requires the participation of its individual members. *Colorado Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 510 (Colo. 2018); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). When a plaintiff claims associational standing, it is not enough to aver that unidentified members have been injured; rather, it must specifically identify members who have suffered the requisite harm. *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d at 208-209 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)).

Defend Colorado's complaint fails to identify a single member who has been or will be injured by the Commission's decision to deny Defend Colorado a hearing, leaving its allegations fatally short of establishing that any member would have standing to sue in its own right. It instead relies on vague, general references to unidentified members, claiming that a Serious nonattainment reclassification would create a burden upon them. Compl. ¶¶ 22-29. Defend

Colorado has also failed to demonstrate how the Commission's decision denying it a hearing caused its members injury. Defend Colorado cannot establish injury related to the potential for more burdensome regulations without alleging with requisite specificity that one or more members are subject to the demands of those regulations. *See CF&I Steel Corp. v. Colorado Air Pollution Control Comm'n*, 610 P.2d 85, 91-2(Colo. 1980) (holding that there is "nothing in the APA that denies standing to that individual to initiate a pre-enforcement challenge to the validity of the regulation, if he is subject to its demands"). Defend Colorado has not identified members that could be harmed, nor has it demonstrated that any alleged harm to those members will result from the Commission's denial of its request for a hearing. Consequently, any claim of associational standing must fail.

IV. DEFEND COLORADO FAILS TO STATE A CAUSE OF ACTION IN ITS FIRST, SECOND AND THIRD CLAIMS FOR RELIEF

A. Standard of Review Under C.R.C.P. 8 and 12(b)(5)

C.R.C.P. 8(a) requires that Defend Colorado set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Warne v. Hall,* 373 P.3d 588 (2016), the Colorado Supreme Court adopted the Rule 8 pleading standard articulated in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). Under Colorado law, then, in order to survive a motion to dismiss under C.R.C.P. 12(b)(5), "the factual allegations of the complaint must be enough to raise a right to relief 'above the speculative level'." 373 P.3d at 591 (citing *Twombly,* 550 U.S. at 556). The Colorado Supreme Court reiterated that it need not accept as true those allegations in a complaint that are legal conclusions, as opposed to allegations of fact. *Warne,* 373 P.3d at 591 (citing *Iqbal*, 556 U.S. at 678); *see also Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). Further, under C.R.C.P. 12(b)(5), a "complaint may be dismissed if the substantive law does not support the claims asserted." *Western Innovations,* 187 P.3d at 1158.

In its Complaint, Defend Colorado's allegations of fact, even if accepted as true, do not establish a claim for relief. Instead, the Complaint is based on incorrect and misleading conclusions of law. Further, Defend Colorado's claims against the Commission are unsupported by substantive law, and should therefore be dismissed.

B. The Colorado Air Act Did Not Require the Commission to Grant Defend Colorado's Request for Hearing, Requiring Dismissal of the First Claim for Relief

Defend Colorado alleges that its Petition contained two separate requests: for a public hearing to debate the influence of international emissions and exceptional events upon the ozone attainment status of the Denver Nonattainment Area and for issuance of a declaratory order to compel the State to submit a §179B(b) demonstration to the EPA with the May Data Certification. Compl. ¶¶ 114, 121. The Commission determined that "Defend Colorado does not have standing for the declaratory order requested, and there are no additional grounds for a hearing." Ex.2. ¶ 8; Compl. ¶ 127.

In its first claim for relief, Defend Colorado claims that the Commission violated the Colorado Air Act by failing to grant Defend Colorado's separate request for hearing before the State, through CDPHE, sends the EPA the May Data Certification. Compl. ¶ 152. Defend Colorado cites to three provisions of the Colorado Air Act, alleging that each of these provisions mandate a public hearing before the May Data Certification can be sent to the EPA. *Id.* ¶¶ 142-44. Even if Defend Colorado's request for hearing was severable,[12] none of the statutes cited support Defend Colorado's claim. Therefore, Defend Colorado's first claim for relief must be dismissed under C.R.C.P. 12(b)(5).

i. The May Data Certification Does Not Amend, Modify, or Require Compliance with an Ambient Air Quality Standard

[12] The Commission's argument that the request for hearing was not severable, and therefore this Complaint should be dismissed under C.R.C.P. 12(b)(1), is set forth in *supra* Section III.B.

Defend Colorado claims that the May Data Certification will "'amend[], or modify[]...ambient air quality standard[s]...' under Colorado's Air Act pursuant to C.R.S. §25-7-110(1)", and therefore a public hearing was required. Compl. ¶¶ 149, 151. This is a legal conclusion, which this Court need not accept as true. *Warne,* 373 P.3d at 591. Defend Colorado misquotes §25-7-110(1), leaving out the critical reference therein to §25-7-108. The full text of the pertinent language from §25-7-110(1) is as follows:

> Prior to adopting, promulgating, amending, or modifying any ambient air quality standard authorized in section 25-7-108,... the commission shall conduct a public hearing thereon as provided in section 24-4-103, C.R.S.

Section 25-7-108(1) authorizes the Commission to adopt ambient air quality standards that describe: 1) the maximum concentrations of pollutants that can be tolerated; 2) the air quality goals to be achieved by control programs; or 3) varying degrees of pollution of ambient air. The May Data Certification does none of these things. *See supra* Section II.B-D. Moreover, §25-7-108(3) makes clear that the ambient air quality standards referred to in this section are state standards, not the federal NAAQS. This case does not relate to state ambient air quality standards. Additionally, §25-7-110(1) clarifies that the hearing required is a hearing under §24-4-103, which is the rulemaking section of the APA. Defend Colorado does not seek a rulemaking hearing, further demonstrating that the statute relied upon has no relationship to the relief requested by Defend Colorado in its Complaint. *See* Ex. 4; Compl. ¶ 152, Prayer for Relief.

Defend Colorado next claims that the May Data Certification required compliance with ambient air quality standards, and therefore the Commission was required to hold a hearing under §25-7-124(3). Defend Colorado also mischaracterizes this statute, the full text of which provides:

> [CDPHE] may enter into agreements with any air pollution control agencies of the federal government or other states and with regional air pollution control agencies, but any such agreement involving, authorizing, or requiring compliance in this state with any ambient air quality standard or emission control regulation shall not be

> effective unless or until the commission has held a hearing with respect to such standard or regulation and has adopted the same in compliance with section 25-7-110.

§25-7-124(3), C.R.S. This statute addresses agreements between the CDPHE and federal agencies, and, critically, provides that any such agreement "involving, authorizing, or requiring compliance in this state with any ambient air quality standard" is not effective until the Commission has adopted that standard following a rulemaking hearing. The Commission agrees that pursuant to §25-7-124(3), if the May Data Certification was an agreement between CDPHE and the EPA that required compliance with an ambient air quality standard, then such agreement would not be effective unless and until the Commission had held a public hearing at which it adopted that ambient air quality standard. However, the May Data Certification is not an agreement "involving, authorizing, or requiring compliance in this state with any ambient air quality standard." As described in more detail in *supra* Sections II.B-D, the May Data Certification cannot reasonably be characterized as anything other than a report to the EPA certifying that ozone data have been submitted to the EPA and subject to quality assurance. Therefore no public hearing was required under §25-7-110(1) or §25-7-124(3).

ii. The May Data Certification Does not Amend, Modify, or Require Compliance with an Emission Control Regulation

Defend Colorado also claims that the May Data Certification will "'amend[], or modify[]…emission control regulation[s]…' under Colorado's Air Act pursuant to C.R.S. §25-7-110(1)", and will require compliance with an emission control regulation pursuant to §25-7-124(3), and therefore a public hearing was required. Compl. ¶¶ 149-51. This is a legal conclusion, which this Court need not accept as true. *Warne,* 373 P.3d at 591. It is also incorrect.

"Emission control regulation" is a defined term and includes:

> [A]ny standard promulgated by regulation which is applicable to all air pollution sources within a specified area and which prohibits or establishes permissible limits for specific types of emissions in such area, and also any regulation which by its

> terms is applicable to a specified type of facility, process, or activity for the purpose of controlling the extent, degree, or nature of pollution emitted from such type of facility, process, or activity, any regulation adopted for the purpose of preventing or minimizing emission of any air pollutant in potentially dangerous quantities, and also any regulation that adopts any design, equipment, work practice, or operational standard

§25-7-103(11), C.R.S. The May Data Certification is not a standard or regulation adopted by the Commission, nor would it by its own terms impose legal obligations upon air pollution sources. The May Data Certification is therefore not an emission control regulation as defined by the Colorado Air Act, nor is it an agreement between CDPHE and the EPA that would require compliance with any emission control regulation. *See supra* Section II.B-D. Thus, no public hearing was required.

iii. The May Data Certification Does Not Amend or Modify any Regulatory Plan or Program

Next, Defend Colorado claims that the May Data Certification will "'amend[], or modify[]…regulatory plans or programs' under Colorado's Air Act pursuant to C.R.S. §25-7-110", and therefore a hearing was required. *See* Compl. ¶¶ 149, 151. This is a legal conclusion, which this Court need not accept as true. *Warne,* 373 P.3d at 591. Defend Colorado again overlooks pertinent statutory language from §25-7-110(1), which states:

> Prior to adopting, promulgating, amending, or modifying … any other regulatory plans or programs authorized by sections 25-7-105(1)(c) or 25-7-106, the commission shall conduct a public hearing thereon as provided in section 24-4-103, C.R.S.

§25-7-110(1), C.R.S. Thus, under this statute, a rulemaking hearing is required prior to Commission action on only the specific "regulatory plans or programs authorized by sections 25-7-105(1)(c) or 25-7-106." Section 25-7-105(1)(c) speaks to regulations necessary to implement the "prevention of significant deterioration [PSD] program in conformity with part 2 of this

article and federal requirements", which is unrelated to this case.[13] If the Legislature had intended this section to refer to the State's ozone SIP (i.e. the regulatory program to attain the ozone NAAQS),[14] the Legislature could have pointed here to §25-7-105(1)(a), which gives the Commission the duty to adopt "a comprehensive state implementation plan which will assure attainment and maintenance of national ambient air quality standards." It did not do so, pointing only towards §25-7-105(1)(c).

Section 25-7-106(1) is also irrelevant to the May Data Certification. This statute gives the Commission authority to adopt regulations pertaining to specified matters, including, without limitation, classification of the state into attainment, nonattainment, and unclassifiable areas[15], classification of different types of air pollution, and emission control regulations. The May Data Certification does not involve a rulemaking as described above, or the amendment or modification of an air quality program. Thus, no public hearing was required.

iv. §25-7-105(18) Does Not Require a Public Hearing

Separately from its other arguments, Defend Colorado maintains that the Commission was required to hold a public hearing pursuant to §25-7-105(18), C.R.S. Compl. ¶ 144. Again, this is a legal conclusion, which this Court need not accept as true. *Warne,* 373 P.3d at 591. Once again, Defend Colorado omits language which is critical to understanding the statute (*see* Compl. ¶¶ 67 and 144); in full, it reads:

> Upon petition by any person or on its own motion, for good cause shown, the commission may determine that the emission inventory of any criteria pollutant, including a surrogate or precursor for that pollutant, for a region of the state is inadequate for purposes of commission rule-making or adjudications in connection with development of the state implementation plan, selection of pollution control

[13] The PSD program applies to the permitting and construction of new sources outside a nonattainment area. This case involves the Denver Nonattainment Area and therefore has no relationship to the PSD program. *See* §25-7-201(1), C.R.S. ("It is the policy of this state to prevent the significant deterioration of air quality in those portions of the state where the air quality is better than the national ambient air quality standards…"); Compl. ¶¶ 23-29.
[14] Accepting, for purposes of argument, that the May Data Certification even has any relationship to the ozone SIP.
[15] An "unclassifiable" area is one where there is not sufficient data to determine whether the Commission should recommend the area be designated attainment or nonattainment.

> strategies, attribution of emissions to sources or categories of sources, or findings of adverse impacts. If, after conducting a public hearing in accordance with the rule-making provisions of the "State Administrative Procedure Act", article 4 of title 24, C.R.S., the commission finds that the emission inventory should be revised to take into consideration existing credible studies or scientific data in order to reasonably attribute emissions to source categories, it shall direct that such revision be performed prior to a final rule-making or adjudication.

§25-7-105(18), C.R.S. This statute relates to the impact of a Commission finding that the State's emission inventory is inadequate for purposes of a rulemaking or adjudication, and is inapplicable here.

First, the Commission has not determined that the emission inventory of any pollutant is inadequate, nor is such a determination required (the statute says the Commission "may determine"). §25-7-105(18), C.R.S.; Ex.2 ¶ 4. Second, there was no rulemaking or adjudication affiliated with Defend Colorado's Petition, and any "determination" of inadequate inventory under this statute must have been affiliated with a rulemaking or adjudication. *Id.*

Third, the result of a determination that the inventory is insufficient is that the Commission would hold a rulemaking hearing to adopt a revision to the State's emission inventory. §25-7-105(18), C.R.S. That was not the relief requested by Defend Colorado in its Petition, nor is it the relief requested in the Complaint. Compl., Prayer for Relief; Ex.4. Defend Colorado was not seeking to compel the Commission to revise the State's official emission inventory, which was used in the attainment demonstration submitted to the EPA in May 2017 and approved by the EPA in July 2018. *Id*; *see* 83 Fed. Reg. 31,068 (July 3, 2018). Instead, Defend Colorado sought a public hearing at which the Commission would consider the impacts of international emissions and exceptional events upon the attainment status of the Denver Nonattainment Area, and following which the Commission would issue a declaratory order directing the CDPHE to pursue a §179B(b) demonstration in the May Data Certification. Compl. ¶ 114; Ex.4 at 1-2. That relief is completely unrelated to §25-7-115(18).

The emission inventory referred to in §25-7-115(18) is not the same thing as the ozone ambient air data that are reported to the EPA in the May Certification. Section 25-7-115(18) speaks to the inventory of Colorado-based emission sources used in the attainment demonstration submitted to comply with 42 U.S.C. §7511a (i.e. who are the sources, and what type and quantity of air pollutants do they emit). This emission inventory, prepared by CDPHE, and over which the Commission has rulemaking authority, does not include international sources. *See* §25-7-106(6), C.R.S. (giving the Commission rulemaking authority to require owners or operators of air pollution sources in Colorado to collect and provide information about their emissions). A rulemaking pursuant to which the Commission would direct a revision of the inventory under §25-7-115(18) would not address Defend Colorado's goal of accounting for the contribution of international sources in the May Data Certification. Thus, no public hearing was required.

C. The Commission Did Not Violate the Clean Air Act or Colorado Air Act by Denying Defend Colorado's Request for Hearing, and Therefore its Second Claim for Relief Must Be Dismissed

In its Second Claim for Relief, Defend Colorado claims that by denying its Petition and refusing to hold a public hearing following which the Commission would address, in the May Data Certification, the impacts of exceptional events and international emissions on ozone concentrations, the Commission violated requirements of the Clean Air Act and the Colorado Air Act. Compl. ¶¶ 163, 167. Defend Colorado's claim is, again, based on a mischaracterization of the applicable statutes and a misunderstanding of the May Data Certification.

Defend Colorado claims that the denial of its Petition and request for hearing amounted to a violation of the Colorado Air Act requirement that the Commission develop an air quality program that is "based on '*the most accurate inventory of air pollution sources possible.*'" *Id.* ¶ 158 (citing §25-7-102, C.R.S.) (emphasis in original). This statute actually reads as follows:

> The general assembly further recognizes that a current and accurate inventory of actual emissions of air pollutants from all sources is essential for the proper

> identification and designation of attainment and nonattainment areas, the determination of the most cost-effective regulatory strategy to reduce pollution, the targeting of regulatory efforts to achieve the greatest health and environmental benefits, and the achievement of a federally approved clean air program. In order to achieve the most accurate inventory of air pollution sources possible, this article specifically provides incentives to achieve the most accurate and complete inventory possible and to provide for the most accurate enforcement program achievable based upon that inventory.

There is no reasonable construction of this statute that supports an argument that a report made by the State to the EPA of ozone levels measured at an air quality monitor must account for the international contributions towards those ozone levels, which contributions are not even a part of the inventory referenced in the statute.

Defend Colorado also claims that EPA regulations under the Clean Air Act require that the May Data Certification be "'accurate to the best of [Colorado's] knowledge.'" Compl. ¶ 159 (citing 40 C.F.R. §58.15(a)). This is close to the truth; the regulation requires that the May Data Certification certify that "the ambient concentration data are accurate to the best of [the official's] knowledge, taking into account quality assurance findings." 40 C.F.R. §58.15(a). As described in Section II.B-D *supra*, this regulation requires a certification that the State is accurately reporting the ozone values recorded at the monitors, after the monitored data undergoes quality assurance. It does not require the State to address or consider in the certification the originating sources of the ozone measured at the monitors.

For all these reasons, Defend Colorado's second claim for relief should be dismissed.

D. There is No Cause of Action Against the Commission For "Acquiescing" to Allegedly Improper Interference by the Governor, and Therefore the Third Claim for Relief Must Be Dismissed

In its Third Claim for Relief against the Commission, Defend Colorado alleges that the Commission's decision not to take up its Petition was improperly based on its alleged "acquiescence" to the Governor's improper interference, which Defend Colorado alleges

violated the Colorado Constitution's requirement for separation of power. Compl. ¶ 176. This claim is unsupported and should be dismissed.

Article III of the State Constitution "reflects the explicit and strict separation of powers in our state constitution: the legislative, executive, and judicial branches of government may exercise only their own powers and may not usurp the powers of another co-equal branch of government." *Vagneur v. City of Aspen,* 295 P.3d 493, 504 (Colo. 2013). There can be no credible allegation here that the Commission's decision declining to take up Defend Colorado's Petition was a violation of this constitutional provision.

The only "direction" by the Governor involved in Defend Colorado's third claim for relief was direction from the Governor to CDPHE not to submit a §179B(b) demonstration, and not any direction to the Commission, a separate "type-1" agency under Colorado law. Compl. ¶¶ 12, 31, 116. Defend Colorado does not, and cannot, contend that the Governor issued a directive to the Commission to deny Defend Colorado's Petition and that the Commission "obeyed" any directive in issuing its March 21 Order. Even if there had been direction to the Commission (which there was not), the Commission's March 21 Order was expressly based on Defend Colorado's lack of standing to pursue a declaratory order. Ex.1. There is nothing in the March 21 Order[16] supporting the conclusion that the Governor's separate direction to CDPHE had any influence on the Commission's decision. *Id*; *c.f. Adarand Constructors, Inc. v. Owens,* 2000 WL 490690 (D. Colo. Apr. 24, 2000) (dismissing a claim against the Governor based on executive orders issued by a previous Governor, where those orders were without legal effect and constituted voluntary requests).

Thus, there are no facts supporting an allegation that the Commission "acquiesced" to anything, and Defend Colorado's Third Claim for Relief must be dismissed.

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[16] Or the April 8 Order, *see* Ex.2.

V. DEFEND COLORADO IS NOT ENTITLED TO DECLARATORY RELIEF UNDER C.R.C.P. 57

Defend Colorado seeks judicial review of the Commission's decision under §24-4-106(4) of the APA, §25-7-120 of the Colorado Air Act and C.R.C.P. 57. Compl. ¶¶ 32-3, 36-7. Defend Colorado's C.R.C.P. 57 claim against the Commission must be dismissed because Defend Colorado has an adequate remedy at law under the Colorado Air Act and the APA. *Board of County Com'rs of Gilpin County v. City of Black Hawk*, 292 P.3d 1172, 1176 (Colo. App. 2012) (citing *Purcell v. Colo. Div. of Gaming*, 919 P.2d 905, 907 (Colo. App. 1996)); *Collopy v. Wildlife Comm'n*, 625 P.2d 994 (Colo. 1981).

With regard to relief sought against the Commission, Defend Colorado seeks several remedies in response to alleged violations of statutory and constitutional right. Compl. ¶¶ 19-21, Prayer for Relief. Under the APA, this Court has the power to review and remedy alleged denials of statutory right and constitutional right arising from agency action. In the event the Court found such errors, the Court is authorized to:

> ...hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate....

§24-4-106(7), C.R.S. All remedies sought by Defend Colorado are available under the APA. Therefore, the Court lacks jurisdiction under C.R.C.P. 57.

VI. CONCLUSION

For all the reasons set forth herein, this Court should dismiss the Complaint against the Commission, with prejudice, pursuant to C.R.C.P. 12(b)(1) and (b)(5).

Respectfully submitted this 17th day of May, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **DEFENDANT AIR QUALITY CONTROL COMMISSION'S MOTION TO DISMISS THE FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF** upon all parties below electronically via the Colorado Courts E-File system this 17th day of May, 2019:

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